No. 80-1409

IN THE

Supreme Court of the United States

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

WARNER-LAMBERT COMPANY Doing Business Under the Name of WARNER-LAMBERT CO., AMERICAN CHICLE DIVISION, ARTHUR KRAFT, ED HARRIS, JAMES O'MAHONEY and JOHN O'ROURKE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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SUMMARY OF ARGUMENT

The judgment of the New York State Court of Appeals was rendered on November 20, 1980 and the Petition is therefore untimely under Rule 20 of this Court. Further, no federal statute, treaty or constitutional issue was ruled on by any court below, nor did Petitioner make any constitutional claim whatever in any court below. The decisions of the New York courts involved solely a determination of New York law.

ARGUMENT

THE PETITION SHOULD BE DENIED

This brief is filed on behalf of all Respondents in opposition to the petition of the People of the State of New York ("Petitioner") for a writ of certiorari to review a unanimous judgment of the New York State Court of Appeals dismissing an indictment charging Respondents with six counts of reckless manslaughter and criminally negligent homicide.

A. The Petition is Untimely

Petitioner asserts that the judgment of the New York Court of Appeals for which Petitioner seeks review was entered on December 2, 1980. Thus, pursuant to Rule 20.1 the 60 day period within which to file a petition for certiorari in accordance with this Court's rules would have terminated on January 31, 1981. The present petition, however, was not served and filed with this Court until February 19, 1981 and, therefore, is clearly untimely.[1]

1. In fact, the judgment was entered by the New York Court of Appeals and became final for purposes of certiorari on the date it was rendered, *i.e.* on November 20, 1980. *See* Appendix A2; *Department of Banking* v. *Pink*, 317 U.S. 264 (1942), *rehearing denied*, 318 U.S. 802 (1943); *Supreme Court Rule* 20.4. Accordingly, the petition should have been filed on or before January 19, 1981.

While this Court has, on occasion, accepted untimely petitions, there are no mitigating circumstances which would make such action appropriate in this case. *Compare, e.g., Schacht v. United States*, 398 U.S. 58, 63–65 (1970).

B. The Decision Below Involved Solely a Determination of New York Law

Petitioner purports to invoke the jurisdiction of the Court pursuant to 28 U.S.C. § 1257(3). That statute provides jurisdiction to review final state court judgments by writ of certiorari only where the validity of a federal statute or treaty is at issue, or where a claim has been asserted below that a state statute violates federal law, or where a claim has been made below expressly based on a federally created title, right, privilege or immunity. The highest state court must have expressly ruled on the federal question sought to be reviewed, *Louisville & Nashville Railroad* v. *Higdon*, 234 U.S. 592 (1914); *Raley* v. *Ohio*, 360 U.S. 423 (1959) or the federal question must have been "specially set up or claimed" in the state court proceeding so that it was properly before the highest state court, *Beck* v. *Washington*, 369 U.S. 541, *rehearing denied*, 370 U.S. 965 (1962); *Oxley Stave Co.* v. *County of Butler*, 166 U.S. 648, 655 (1897). None of the requisite criteria are present in this case.

No federal treaty or statute was involved and the New York Court of Appeals did not rule on any federal question. Respondents' motions to dismiss the indictment in the state court were litigated and decided solely under the standards of the New York Criminal Procedure Law. Respondents' motions turned solely on the issue of whether

there was legally sufficient evidence, as defined by state statutory and decisional law, that Respondents were or should have been aware of a substantial and unjustifiable risk of death under circumstances amounting to a gross deviation from reasonable care. In deciding this issue, the Court of Appeals clearly determined an issue of *state*, not federal, law. It held that, under New York law, causation is an essential element of the crimes charged and that there was no evidence presented to the grand jury that Respondents were or should have been aware of at least one possible cause of the explosion – the formation of volatile liquid oxygen from the use of liquid nitrogen ("liquefaction"). (Opinion of the New York State Court of Appeals, *reprinted as* Appendix C to the Petition, at 55a).

Petitioner asserts that such a decision was "tantamount" to a finding by the New York State Court of Appeals that a trial would violate Respondents' due process rights (Petition at 5). The assertion is totally groundless. The decisions below were all concerned, expressly and exclusively, with the interpretation and application of the New York statute. They made no reference whatever to due process.

It is equally clear that no federal question was specially set up, or claimed in any manner, in the courts below. Throughout the proceedings below, Petitioner, like the New York courts, addressed itself solely to the interpretation of the New York statute. Accordingly, there is no basis on which the jurisdiction of this Court can be invoked.

CONCLUSION

For all the foregoing reasons, the petition of the People of the State of New York for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1981

Appendices

LIST OF CORPORATE AFFILIATION PURSUANT TO RULE 28.1

Respondent Warner-Lambert Company has no parent. The following are the subsidiaries (except wholly owned subsidiaries and companies wholly owned by such subsidiaries) and affiliates of Respondent Warner-Lambert Company:

Bermer Tool & Die, Inc. (U.S.)
Cor Candies Corporation (U.S.)
Filtronics Ltd. (U.S.)
Tetra Sales (U.S.)
Vergo, S. A. (France)
Laboratorios Substantia C.A. (Venezuela)
Velarca, S.A. (Venezuela)
Laboratorios Promaco, S.A. (Peru)
Meito Adams K.K. (Japan)
Parke Davis & Sankyo, Ltd. (Japan)
Parke Davis & Company, Limited (Pakistan)
Parke Davis (India) Limited
Parke Davis (Private) Limited (Iran)
Warner - Hudnut (Lanka) Limited (Sri Lanka)
Warner - Hindustan Limited (India)
Warner - Lambert (Pakistan) Limited
C. Reichert Optische Werke, A.G. (Austria)
Goedicke A.G. (Germany)
Kessi-Werke Max Messmann G.m.b.h. (Germany)
P.T. Warner-Lambert Parke-Davis Indonesia (Indonesia)
Pharma-Deko Ltd. (Nigeria)
Sisterna Integrado Prescripciones Offalmicas Optoservicio Ltda. (Columbia)
Perma-Sharp Celik Sanayii Anonim Sirketi (Turkey)
Perma-Sharp Boudros Hellas S.A. (Greece)

Remittitur

Court of Appeals
State of New York

915-77

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

2 No. 281

The People &c.,

Respondent,

v.

Warner-Lambert Company, doing business under the name and style of Warner-Lambert, Co., American Chicle Division, et al.,

Appellants.

The appellant(s) in the above entitled appeal appeared by Mudge Rose Guthrie & Alexander; Robert Kasanof & Bart M. Schwartz; Arkin & Arisohn; and Andrew M. Lawler, Jr.; *the respondent(s) appeared by* John J. Santucci, District Attorney, Queens County.

The Court, after due deliberation, orders and adjudges that the order is reversed and the indictment dismissed. Opinion by Jones, J. Concur: Cooke, Ch.J., Jasen, Gabrielli, Meyer, Sweeney and Cardamone, JJ.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 20, 19 80.